APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 26, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5720

UNITED STATES OF AMERICA

v.

KEITH MANTELL

Keith Mantell and Isogenics, Inc., Appellants

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. No. 90-cr-00100)

Present: BECKER, *Chief Judge*, SLOVITER, STAPLETON, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, McKEE, and HEANEY,* Circuit Judges,

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this Court; and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular

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* As to panel rehearing only.

active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

s/ Illegible
Chief Circuit Judge

DATED: JUN 26 1998

APPENDIX B — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED APRIL 13, 1998

NOT-FOR-PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5720

UNITED STATES OF AMERICA

v.

KEITH MANTELL

Keith Mantell and Isogenics, Inc., Appellants

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Crim. No. 90-cr-00100)
District Judge: Honorable Nicholas H. Politan

Argued: March 20, 1998

Before: BECKER, *Chief Circuit Judge,*
RENDELL, and HEANEY, **Circuit Judges.*

(FILED APR 13 1998)

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*Honorable Gerald W. Heaney, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix B

MEMORANDUM OPINION

BECKER, *Chief Circuit Judge.*

This is an appeal by Keith Mantell from an order of the district court for the District of New Jersey dismissing his motion for return of property, filed nearly fve years after his criminal conviction, on grounds of laches. Because we do not write for publication (there is no precedential issue involved) but only for the parties and the district court, we need not set forth the background facts and procedural history, and limit our discussion to our resolution of the issues.[1]

There are two aspects of the case. The first involves appellant's claim that he is entitled to the return of the seized Isogenics bank account. Although Judge Politan held that the appellant's action was barred by the doctrine of laches simply because of the passage of time, we find his *ratio decedendi* on this point inadequate. We do however, affirm his order on the grounds that this account was forfeited to the government pursuant to Mantell's plea agreement.[2] As part of that agreement, Mantell stipulated that certain enumerated property would be forfeited from him (A24; *see* A39-56) and that "$100,000.00 will be held in a trust account for [Mantell's] three children and that he will have no access to the principal or proceeds." (A24). On October 9, 1991, the district court

1. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291.

2. This argument was raised before the district court in the government's "Brief in Opposition to Defendant's Motion to Return Property." App. at 5-6. We may affirm on any basis finding support in the record that was raised before the district court.

ordered that the property enumerated in the plea agreement be forfeited pursuant to 21 U.S.C. § 853 (*see* SA 2). Mantell's promise to place $100,000 in trust for his children resulted in a consent order between the government and the Mantell children's trustee being entered by the district court on September 23, 1994, pursuant to which the trust was established.

Although Mantell contends that $205,248.56 was forfeited (in violation of the plea agreement), the only money ordered forfeited from Mantell was $105,248.56. The plea agreement represented that "[t]he United States will not move to forfeit any assets of Keith Mantell that are not contained within *Schedule A,*"(A24) and it did not. While the government "seized" a total of $205,248.56 from Mantell pursuant to warrants issued at the time of his arrest, including $110,726.93 from a Citizens First Bank account, only $105,248.56 of that total actually was ordered forfeited from Mantell. His contention that the plea agreement specifically contemplated that the $100,000 used to create the trust for his children would come from the $105,248.56 specified in Schedule A for forfeiture is baseless. During the plea colloquy the government stated that the $100,000 that would fund the trust was "not contained in Schedule A" to the plea agreement. (A85) As the Assistant United States Attorney further explained, "[w]e have accepted cash in the amount more than contained within Schedule A. The amount not contained in Schedule A, which is $100,000, will be returned to Mr. Mantell at sentencing and be put in the trust account as stated." *Id.*

The second issue concerns personal property and other items left at 451 Ridgewood Rd. On this point we agree with Judge Politan, and hold that the Mantell's action is indisputably barred by the doctrine of laches. However, we base this

determination not only on the length of time between the seizure and this lawsuit, as did Judge Politan, but also on other evidence contained in the record. More specifically, we accept the government's contention that, with respect to the specific property at issue, Mantell had notice of the seizure at least as early as April, 1991, the date he entered into his plea agreement with the government. In April, 1991, Mantell knew that he was forfeiting the real property at 451 Ridgewood Rd. and was therefore put on inquiry notice regarding the fate of the contents of that property. Yet his motion seeking return of the property was not filed until July 3, 1996.

The elements of the equitable defense of laches are "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 90 (3d Cir. 1984). We are satisfied that Mantell showed a clear lack of diligence in not asserting an interest in the contents of his seized real property. Furthermore, the government has demonstrated equally clear prejudice, in that the property at issue has already been disposed of.

For the foregoing reasons the order of the district court dismissing Mantell's action will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

BY THE COURT:

s/ Illegible
Chief Circuit Judge

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-5720

UNITED STATES OF AMERICA

v.

KEITH MANTELL

Keith Mantell and Isogenics, Inc., Appellants

On Appeal From the United.States District Court
for the District of New Jersey
(D.C. Crim. No. 90-cr-00100)
District Judge: Honorable Nicholas H. Politan

Argued: March 20, 1998

Before: BECKER, *Chief Circuit Judge*,
RENDELL, and HEANEY.*Circuit Judges.

(FILED APR 13 1998)

JUDGMENT

This case came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 20, 1998. On consideration whereof, it is now here

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* Honorable Gerald W. Heaney, United States Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix B

ORDERED AND ADJUDGED by this court that the order of the district court of October 2, 1996 be and the same is hereby affirmed.

ATTEST:

s/ R. Douglas Sisk
Clerk

DATED: APR 13 1998

APPENDIX C — LETTER OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED SEPTEMBER 30, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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NOT FOR PUBLICATION

September 30, 1996

LETTER OPINION
ORIGINAL ON FILE WITH THE CLERK OF THE COURT

Neil R. Gallagher, Assistant
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Re: United States of America
v. Keith Mantell
Criminal Action No. 90-100 (NHP)

Appendix C

Dear Counsel:

This matter comes before the Court on the motion of claimant Keith Mantell for the return of property from the United States of America, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The matter is resolved without oral argument.[1] For the reasons stated herein, claimant's motion is **DENIED.**

STATEMENT OF FACTS

In 1990, claimant, a chemist, was the owner and operator of Isogenics, Inc. In May of 1990, claimant was arrested and charged with crimes relating to controlled substances in violation of 21 U.S.C. § 841(d) and § 846. Consequently, on October 1, 1991, claimant pled guilty to a one count Information charging conspiracy to distribute ephedrine in violation of the above-mentioned statutes. For said plea, claimant was sentenced by the Honorable H. Lee Sarokin to forty months imprisonment. Claimant served thirty-seven months, and was released on September 15, 1995. He is currently subject to three years supervised release.

At the time of his arrest, a number of items were seized by the Government, including real property located at 451 Ridgewood Road, Washington Township, New Jersey, and

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1. It is within the discretion of the district court to determine whether a hearing on the motion is necessary. *Dickens v. Lewis*, 750 F.2d 1251, 1255 (5th Cir. 1984). An evidentiary hearing is granted only when the claimant presents detailed and non-conjectural facts which, if provided, would require the grant of relief and such facts must be material, disputed pertinent to an issue necessary to resolve the motion. *Matter of 949 Erie St., Racine, Wis.*, 645 F. Supp. 55, 57 (E.D. Wis. 1986), *appeal dismissed*, 824 F.2d 538 (7th Cir. 1987).

$205,248.56 in United States currency, consisting of $94,521.62 from claimant and $110,726.93 from a bank account registered to Isogenics. Pursuant to the plea agreement, claimant surrendered numerous assets, including the real property referenced-above and $105,248.56 in United States currency

Claimant filed the instant motion on July 3, 1996, demanding the return of items inside the real property and the $110,726.93 from the Isogenics bank account. Mantell asserts that these items were not part of the plea agreement.[2]

DISCUSSION

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> A person aggrieved by an unlawful search and seizure or by the deprivation of property may move the district court for the district in which the property was seized for the return of the property on the ground that such person is entitled to lawful possession of the property. The court shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the

2. The Government contends that the full amount of $205,248.56 was contemplated as part of the plea agreement. The parties agreed that $100,000.00 of that amount would be set aside in a trust fund for claimant's children. Said trust fund was created and one of claimant's relatives, Merideth Mantell Chang, was named as the trustee. *See* Consent Order for the Disbursements of Funds and the Establishment of a Trust (Sept. 23, 1994). Thereafter, the remainder of the monies, $105,248.56, was specifically forfeited by claimant in the plea agreement. *See* Plea Agreement between Keith Mantell and the United States of America (dated Apr. 5, 1991, filed Oct. 9, 1991).

> property shall be returned to the movant, although reasonable conditions may be imposed to protect access and use of the property in subsequent proceedings. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Fed.R.Crim.P. 41(e). The district court in which the claimant was tried has ancillary jurisdiction to hear a claimant's post trial motion for the return of seized property. *United States v. Giovanelli*, 998 F.2d 116, 118 (2d Cir. 1993) ; *United-States v. Kelly*, 872 F. Supp. 556, 559 (N.D.Ill. 1994); *United States v. Cills*, 698 F. Supp. 22, 25 (D.P.R. 1988).

"Where criminal proceedings are no longer pending against the defendant such motion is treated as a civil equitable proceeding even if styled as being pursuant to Fed.R.Crim.P. 41(e)." *Soviero v. United States*, 967 F.2d 791, 792-93 (2d Cir. 1992). As such, the equitable principle of laches is applicable. The elements of the defense of laches are inexcusable delay and lack of diligence on the part of plaintiff resulting in prejudice to defendant. *Equal Employment Opportunity Comm'n v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 80 (3d Cir.) (quotation omitted), *cert. dismissed*, 469 U.S. 925 (1984).

In the instant case, claimant's motion was filed over six years since his arrest and almost five years after he pled guilty. Claimant offers no reason for this immense delay. Accordingly, claimant's motion for the return of property is barred by the equitable doctrine of laches. *See, e.g., United States v. Wright*, No. 96-6360, 96-7088, 1996 WL 518455, at *2 (4th Cir. Sept.

13, 1996) (holding that claimant's motion for return of property was barred by laches because of ten year lapse from date of seizure). *Cf. United States v. Tofaro*, 468 F. Supp. 1045, 1049 (D. Md. 1979) (holding that three year delay in bringing motion for return of seized money was not unreasonable when in the interim claimant appealed conviction and applied for Certiorari to the United States Supreme Court).

CONCLUSION

For the foregoing reasons, claimant's motion for the return of property is DENIED.

An appropriate Order accompanies this Opinion.

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CRIMINAL ACTION NO. 90-100

HON. NICHOLAS H. POLITAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KEITH MANTELL,

Defendant.

ORDER

This matter having come before the Court on the motion of claimant Keith Mantell for the return of property pursuant to Fed.R.Crim. 41 (e) , and the Court having considered the matter and the submissions of the parties, and for the reasons appearing more particularly in the Letter opinion of this Court in the above-captioned matter, and good cause having been shown,

IT IS on this 30th day of September, 1996 hereby

ORDRED that defendant's motion is **DENIED.**

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.